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88- 1628

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

WOLF POPPER ROSS WOLF & JONES
845 Third Avenue
New York, New York 10022
(212) 759-4600

Co-Lead Counsel for Class Plaintiffs in *In re: Boesky Securities Litigation*, MDL Docket No. 732 M21-45-MP (S.D.N.Y.), and Counsel for Class Plaintiff Matthew C. Budinko in *Budinko v. Boesky, et al.*, 89 Civ. 0845 (S.D.N.Y.).

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

IN THE

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v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movants request that this Court grant them leave to file a brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Michael R. Milken, *et al* ("Petition"). Petitioners have failed to give their consent. (A24)

This Motion is filed on behalf of the class action plaintiffs ("Class Plaintiffs") in *In re: Ivan F. Boesky Securities Litigation,* MDL Doc. No. 732 M21-45-MP ("*Boesky Litigation*")[1] and on behalf of Plaintiff Mat-

1. The *Boesky Litigation* consists of shareholder class actions on behalf of public securities holders allegedly injured by the insider trading of Boesky and others, including Drexel agents, and non-class action suits on behalf of investors in Boesky-affiliated entities who were allegedly defrauded through offering material failing to disclose securities law violations relating to, *inter alia,* such insider trading. The cases were transferred to Judge Milton Pollack by action of the Panel for Multidistrict Litigation on August 5, 1987. (PA 4-5)

thew C. Budinko ("Budinko") in *Budinko v. Boesky, et al.,* 89 Civ. 0845 (S.D.N.Y.) ("*Budinko*").

In 1986 Class Plaintiffs filed complaints against Ivan F. Boesky ("Boesky"), Drexel Burnham Lambert, Inc. ("Drexel"), former Drexel employee Dennis Levine ("Levine"), and others alleging that defendants, *inter alia,* traded in publicly held securities on the basis of inside information. (PA4-5) In 1989 Budinko filed a class action complaint against Boesky, Drexel, and, *inter alia,* the Petitioners herein, for violations of the federal securities laws arising out of alleged illegal agreements and insider trading. Budinko filed his complaint in the Southern District of New York as a related case to the *Boesky Litigation* and *SEC v. Drexel Burnham Lambert, Inc., et al.,* 88 Civ. 6209 MP (S.D.N.Y.) ("*SEC* action").[2] The actions were assigned to Judge Milton Pollack and were to be administered on a coordinated basis for pretrial purposes. (A2)

Shortly after the SEC filed its action, Drexel moved for recusal before the district court and upon denial of its motion then petitioned for a writ of mandamus before the Second Circuit in connection with the *SEC* action and the *Boesky Litigation.* Petitioners, because not then parties to the *Boesky Litigation,* sought mandamus in the *SEC* action only. On November 15, 1988, the Court of Appeals for the Second Circuit denied the defendants' petitions. The defendants then moved for rehearing and rehearing *en banc,* which motions were denied on February 21, 1989.

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2. The SEC filed its complaint against Drexel and Petitioners on September 7, 1988. (PA8) The gravamen of the SEC complaint is the existence of a secret arrangement between Boesky, Drexel, and Milken to violate the federal securities laws by engaging in insider trading, stock manipulation, and fraud in connection with offering materials made to Boesky investors. The SEC filed its complaint as a related case to the *Boesky Litigation,* and it was assigned by the district court to Judge Milton Pollack. (A1)

The matter of recusal in the *Boesky Litigation* is no longer a subject of judicial review, because, while still a defendant in the *Boesky Litigation,* Drexel did not petition this Court for a writ of certiorari. Nevertheless, Movants have a strong interest in the proceedings currently before the Court because disposition of the Petition will directly affect them. Private actions included in or related to the *Boesky Litigation* and pending before Judge Pollack now name or seek to name as defendants some or all of the Petitioners before this Court. Moreover, the private actions until the stay of the mandate had been administered on a coordinated basis with the *SEC* action. Therefore, while the Second Circuit's denial of rehearing *en banc* sets the law in the private actions, those actions will be disrupted if the Petition is granted. Petitioners' repeated attempts to recuse Judge Pollack, which began immediately after the *SEC* action was assigned to him, have and continue to block the forward motion of Movants' case. Movants, in the best position to do so, request the opportunity to protect their interest in avoiding any further disruption and delays.

Furthermore, while Petitioners have failed to consent to Movants' participation in the Petition proceedings, they have injected these proceedings into the *Boesky Litigation* by moving to stay the *Boesky Litigation* and *Budinko* pending the Supreme Court's disposition of the Petition. (A4,5) Moreover, and despite that motion to stay, Petitioners have moved before the Judicial Panel on Multidistrict Litigation to, in part, transfer *Budinko* to either the Eastern District of Pennsylvania or the Central District of California. (A6)

Petitioners have also objected to the joint motion of the SEC and Drexel to modify the stay in the *SEC* action solely to permit the district court to consider and, if appropriate, enter and administer the proposed final Judgment against Drexel and Cary Maultasch, neither of whom now seek to recuse Judge Pollack. (A22-23) Petitioners' objection delays and hinders, *inter alia,*

forward movement in the private litigation because, pursuant to the final Judgment, not only will Drexel be obligated to cooperate in discovery, but Drexel will also pay $350 million into a civil disgorgement fund to persons with valid damages claims against Drexel under the federal securities laws. (A22-23)

Movants have interests which are and will be affected by the Petition and its disposition. Movants respectfully request that they be given the opportunity to protect their interests by filing a brief *amicus curiae* in opposition to the petition for certiorari.

Respectfully submitted,
BERGER & MONTAGUE, P.C.

/s/ DAVID BERGER
David Berger
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

WOLF POPPER ROSS WOLF & JONES

/s/ STANLEY NEMSER
Stanley Nemser
845 Third Avenue
New York, N.Y. 10022
(212) 759-4600

Co-Lead Counsel for Class Plaintiffs and Counsel for Budinko.

IN THE

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October Term, 1988

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1622 Locust Street
Philadelphia, PA 19103
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845 Third Avenue
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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Second Circuit depart from applicable decisions of this Court or render a decision in conflict with the decision of another federal court of appeals on the same matter when the court held that recusal under 28 U.S.C. §455(a) is not appropriate unless a reasonable person, knowing all the facts and circumstances, would question the judge's impartiality?

2. Did the Court of Appeals for the Second Circuit depart from applicable decisions of this Court or render a decision in conflict with the decision of another federal court of appeals on the same matter when the court held (1) that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is clear and indisputable and (2) that the decision of a district court on the issue of recusal is reviewed for abuse of discretion?

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STATEMENT OF THE CASE

On November 15, 1988, the Second Circuit denied Petitioners' and Drexel's (collectively, "defendants") petition for writ of mandamus:

> In sum, we conclude that an objective observer knowing and understanding all the facts and circumstances could not reasonably question Judge Pollack's impartiality. Petitioners have not clearly and indisputably established their right to a writ. Accordingly, for the reasons stated, the petition for a writ of mandamus is denied. (PA 22)

On February 21, 1989, the Second Circuit denied defendants' motion for rehearing *en banc.*[3] (PA 33) Opinions in support of the denial stated that:

> In suggesting in banc review in this case, petitioners have neither demonstrated a lack of uniformity in our decisions relating to recusal of district court judges nor identified a legal question of transcending importance. . . . Accordingly, the standard for in banc review simply has not been met. (PA 38)

The repeated and unsuccessful efforts to recuse Judge Pollack, which culminated in the successive failures before the Second Circuit, began only after the *SEC* action was assigned to Judge Pollack as a related case to the *Boesky Litigation* and were originally directed only to the *SEC* action.

Those first efforts took the form of an *ex parte* phone call to Judge Pollack at his home on September 10, 1988. Concerned that the call had been made *ex parte* and without notice to opposing counsel, and concerned that

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3. Petitioners were not privy to the Second Circuit's deliberations and have no basis for their representation to this Court that rehearing was denied after "three months of deliberations." (P 7)

counsel alleged the need for recusal without investigating or verifying the basis of those allegations, the court scheduled a hearing for September 13, 1988. (A7-8, 10, 12)

The September 13 hearing provided counsel for defendants with the opportunity to discuss at length the reasons for *ex parte* communications with the court who also reminded counsel of their responsibilities under Rule 11:

> You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit? (A10)

Defendants also discussed the related case status of the *SEC* action and conceded that the dispute before the court "really has to do with what started this in the beginning and that is the relation of this case to this court by the Commission." (A9)

After the district court's repeated requests that defendants provide some factual basis for their allegations concerning recusal, defendants then filed a motion to recuse in the *SEC* action only on September 20, 1988. (PA 9) The return date, October 11, was set at a discovery hearing on September 22.

During the September 22 hearing the court denied defendants' motion to stay coordinated discovery pending disposition of the recusal motion. (A 14-15) On September 27, Drexel then filed its recusal motion and heavily redacted supporting papers in the *Boesky Litigation*. Drexel made its motion returnable on October 11, 1988. (A 16-19)

Three days later and while the recusal motions were pending before the district court, defendants petitioned the Court of Appeals for a writ of mandamus seeking to recuse Judge Pollack in the *SEC* action only. (PA 9) Defendants did not mention the companion recusal

motion filed three days earlier in the *Boesky Litigation* and did not serve Class Plaintiffs with the petition papers.

The hearing on the recusal motions took place as scheduled before the district court on October 11, 1988. Six days later the court issued its opinion. (PA 45-50) The district court concluded that it could:

> confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality. (PA 49)

Defendants then petitioned for a writ of mandamus before the Court of Appeals for a second time.

In their numerous trips to the bench, defendants have advanced two contradictory arguments for recusal: first, that Drexel's business dealings with a third-party (Bain Venture Capital) created an appearance of partiality because that arrangement would suggest to an observer that the district court might favor Drexel; second, comments directed to defendants' counsel during hearings and in the October 17 opinion created an appearance of partiality in that the comments would suggest to an observer that the district court disfavored Drexel. Under the guise of arguments for certiorari review, Petitioners advance those arguments again before this Court, this time without Drexel.

SUMMARY OF ARGUMENT

Petitioners advance no special or important reason which would warrant this Court's exercise of its discretion to grant review on writ of certiorari. Petitioners have quoted the appellate court's decision out of context and misconstrued relevant decisions of this Court and the various circuits in an effort to manufacture grounds for review.

ARGUMENT

I. The Second Circuit's decision reflects a faithful application of §455(a) and does not conflict with *Liljeberg* or decisions of other circuit courts.

Under 28 U.S.C. § 455(a) "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Second Circuit, as well as other circuits, has uniformly and consistently construed this statute to mean that § 455(a) "sets up an objective standard for recusal, creating a so called 'appearance of justice' rule." *In re: IBM Corp.*, 618 F.2d 923, 929 (2d Cir. 1980); *see also Anderson v. Local 3 International Brotherhood of Electrical Workers,* 751 F.2d 546, 549 (2d Cir. 1984). The test for determining when recusal is warranted is "whether an objective, disinterested observer fully informed of all the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985).

Last year this Court reaffirmed that recusal for an "appearance of impropriety" turns upon a specific showing by the movant that an interest or a relationship is such that, armed with all the facts, a reasonable observer would infer impropriety. *See Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S.Ct. 2194 (1988).[4]

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4. The primary issue before this Court was whether scienter is an element of a section 455(a) violation. The Court held that actual knowledge was not necessary, but that actual knowledge would go to the question of remedies. *See Liljeberg*, 108 S.Ct. at 2202-03. "[R]ecusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Id.* at 2202.

As the Second Circuit's opinion and decision clearly show, before declining to issue the writ of mandamus, the court carefully analyzed governing law and principles and applied them to the facts before the court. The court expressly acknowledged that the "amended section establishes an objective standard 'designed to promote public confidence in the impartiality of the judicial process.' " (PA 13)

By misconstruing the nature of the disagreement between the majority of the Second Circuit panel and the dissent, Petitioners attempt to create a conflict between the Second Circuit's holding and *Liljeberg* where there is none. Contrary to Petitioners' representations, the dispute between the panel majority and the dissent does not concern defining who is the reasonable person, that is, an "average" person as opposed to a supersophisticate. Instead that dispute concerns determining what that reasonable person would infer when armed with all the facts. (PA 13-14) Cases cited by Petitioners are simply beside the point.

Furthermore, not only do the panel majority and the dissent disagree over *what* conclusions a reasonable person would draw, but they also differ as to *how* to ascertain those conclusions. When the majority refers to "the purely legalistic perspective," it is not defining the reasonable person but is asserting that:

> [l]ike all legal issues, judges determine appearance of impropriety – not by considering what a straw poll of the only partly informed man-in-the-street would show – but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all of the relevant facts would recuse the judge. (PA 14)

The majority's rejection of "straw polls" is required by section 455(a) and *Liljeberg* and is not in conflict with them. Furthermore, the majority's holding is consistent with public policy which refuses to reward those who

argue their cases not only in the courts, but in the press. *See, e.g., In re: United States,* 666 F.2d 690, 695 (1st Cir. 1981); *United States v. Haldeman,* 550 F.2d 31, 136-37 (D.C. Cir. 1976).

Petitioners also attempt to reargue for the fifth time the merits of their initial motion by urging that the majority's opinion further conflicts with *Liljeberg* in that the facts which were before the courts of the Second Circuit were more compelling than those which were before this Court when it decided *Liljeberg*. Petitioners' argument, however, ignores what the relevant facts of *Liljeberg* were: "[t]he success and benefit to Loyola [of which Judge Collins was a trustee] of these negotiations turned, *in large part,* on *Liljeberg prevailing in the litigation before Judge Collins.*" *Liljeberg*, 108 S.Ct. at 2197 (emphasis added). *Liljeberg* confirmed that appearances of partiality arise when there is a nexus between the litigation and the transaction at issue — that is, that the court could render decisions which would affect that transaction. The Second Circuit properly understood *Liljeberg* to require some kind of nexus. (PA 14)

Petitioners have never provided any evidence of a nexus or relationship between the transaction which purportedly required the district court's recusal and the pending litigation. Petitioners have never demonstrated how the litigation could or did affect the transaction. What facts there are show the contrary. (PA 6) That Drexel was willing to continue with the transaction and in fact complete it proves that there was no connection or nexus with the litigation. Petitioners have admitted as much. For example, by affidavit, Counsel for Petitioner Michael Milken averred that "[n]either Palais Royal nor its shareholders [among them Judge Pollack's wife] have any interest in who presides in the SEC case." (A 21)

Furthermore, Petitioners' arguments are rendered moot by the completion of that transaction. No continuing "taint" or "cloud" is present, particularly since

Drexel did not petition for certiorari and Petitioners have never argued that they individually had any interest or involvement in the transaction. Their standing to join in the recusal motion was always derivative – they joined in the motion simply as employees of Drexel. And, if and when Petitioners are no longer employees of or associated with Drexel (P 8), their excuse for prolonging the recusal issue evaporates entirely. Dennis Levine, also a defendant in the proceedings before Judge Pollack, is a former employee of Drexel and yet never joined in the recusal efforts. He is represented by the same Counsel as Petitioner Michael Milken. Presumably Levine did not join because his Counsel recognized that as a former employee of Drexel the alleged appearance of partiality did not encompass him and that his interests were in fact adverse to those of Drexel. It is therefore particularly perplexing that the same Counsel now argues on behalf of Mr. Milken that the purported adverse position of Drexel and Milken provides additional grounds for recusal. (P 8)

II. Mandamus is an extraordinary remedy and the standard of review is for abuse of discretion.

Petitioners' objection to the standard of review employed by the Court of Appeals is without merit and rests upon a misreading of relevant law.

The decision whether to recuse himself is in the first instance with the district judge and is to be reviewed for abuse of discretion. It is settled law that a motion to recuse under § 455(a), no matter when or at what stage of the litigation the motion is brought, is committed to the sound discretion of the district court. *See, e.g., In re: City of Detroit,* 828 F.2d 1160, 1167 (6th Cir. 1987); *United States v. Balistrieri,* 779 F.2d 1191, 1204 (7th Cir. 1985); *United States v. Meester,* 762 F.2d 867 (11th Cir. 1985); *In re: City of Houston,* 745 F.2d 925, 927 (5th Cir. 1984); *In re: Federal Sky-Walk Cases,* 680 F.2d

1175 (8th Cir. 1982); *In re: United States,* 666 F.2d 690 (5th Cir. 1981); *Johnson v. Trueblood,* 629 F.2d 287, 290 (3d Cir. 1980); *In re: Virginia Electric and Power Co.,* 539 F.2d 357, 369 (4th Cir. 1976). In the Second Circuit as well, the standard of review has been and is for abuse of discretion. *See, e.g., In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980). *Liljeberg* did not change that law.

Petitioners mislead when they cite decisions for their implicit position that a relaxed standard of review is applied in the context of mandamus review. *See, e.g., United States v. Balistrieri,* 779 F.2d 1191 (7th Cir. 1985) (petition was denied under abuse of discretion standard); *In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980).

Petitioners also confuse two distinct questions. The first question, which was not even in dispute before the lower court, concerns whether a court should even entertain a petition for mandamus filed to review the denial of a motion to recuse. *See, e.g., Union Carbide Corp. v. U. S. Cutting Service, Inc.,* 782 F.2d 710, 712-13 (7th Cir. 1986) ("in recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify"); *In re: IBM Corp.,* 618 F.2d 923 (2d Cir. 1980).

The second question, which was in issue before the court, concerns under what circumstances the writ of mandamus will issue. The Court answered correctly: the writ of mandamus is an extraordinary remedy, and the petitioner must show that his "right to the writ is clear and indisputable." *Moses H. Cohen Memorial Hospital v. Mercury Construction Co.,* 460 U.S. 1, 18 (1983); *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980); *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976); *see also Carlenstolpe v. Merk & Co.,* 819 F.2d 33, 35 (2d Cir. 1987); *In re: City of Houston,* 745 F.2d 925 (5th Cir. 1984) (question of recusal is reviewable on

petition for writ of mandamus, but petition will not lie in absence of exceptional circumstances); *In re: IBM Corp.*, 618 F.2d 923 (2d Cir. 1980) (writ of mandamus can be used to compel trial judge to recuse himself, but only if petitioner satisfies his burden of establishing that his right was clear and indisputable).

The Second Circuit's application of well-settled and uniform legal principles to the case before it was correct. Those principles too have withstood the test of time. The judicial interest in the timely filing of recusal motions is outweighted by the predominate interest in avoiding piecemeal litigation, minimizing what are essentially interlocutory appeals, and preventing recusal motions from becoming devices for harassment and delay.

Petitioners' arguments before this Court and their litigation strategy before the lower courts abandon these compelling interests. The Second Circuit was right to be concerned about judge shopping and the misuse of mandamus. (PA20)

CONCLUSION

Petitioners use certiorari as an additional device to complicate already complicated litigation and to further obstruct the efforts of *amicus curiae* and others to obtain a hearing on the merits of their claims against Petitioners. Apparently with limitless resources, Petitioners tax the limited resources of the courts and of the litigants. The Petition is frivolous. *Amicus curiae* respectfully requests that this Court decline to exercise its discretion to review.

Respectfully submitted,

BERGER & MONTAGUE, P.C.

/s/ DAVID BERGER

David Berger
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

WOLF POPPER ROSS WOLF & JONES

/s/ STANLEY NEMSER

Stanley Nemser
845 Third Avenue
New York, N.Y. 10022
(212) 759-4600

Co-Lead Counsel for Class Plaintiffs
and Counsel for Budinko

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
	:	88 CIV. No. 3209
Plaintiff,	:	
	:	STATEMENT OF
	:	RELATIONSHIP TO
v.	:	PENDING ACTIONS
	:	
DREXEL BURNHAM LAMBERT INC. et al.,	:	
	:	
Defendants.	:	
	:	

Plaintiff Securities and Exchange Commission ("Commission") respectfully notes, pursuant to Rule 15 of the Rules for the Division of Business Among District Judges, Southern District,[1] that this action is related to various private civil actions against Ivan F. Boesky ("Boesky"), Drexel Burnham Lambert Inc. ("Drexel") and others now pending before Judge Milton Pollack. These private civil cases have been consolidated for pretrial proceedings, transferred to the Southern District of New York, and all assigned to Judge Pollack by an order of the judicial panel on Multidistrict Litigation dated August 5, 1987. *In re Ivan F. Boesky Securities Litigation,* MDL Dkt. No. 732, M-21-45-MP ("Boesky).

1. Rule 15 provides, in pertinent part, as follows:
"Cases are related if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	ORDER NO. 34
In re IVAN F. BOESKY SECURITIES LITIGATION	MDL Dkt. No. 732 M21-45-MP
SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*, Defendants.	88 Civ. 6209 (MP) THIS DOCUMENT RELATES TO ALL CASES:

A hearing having been held on September 22, 1988 to consider discovery program and the Court's draft provisions therefor, and counsel having been heard and the Court having requested that comments and suggestions of counsel be submitted to the Court on or before September 27, 1988, and the Court having received certain suggestions and it being indicated that others may be forthcoming, and it appearing appropriate in the interests of avoiding unnecessary delay to permit the parties in the various suits to move forward with respect to pending documentary discovery without delay, it is meanwhile

ORDERED THAT:

1. To entitle consideration of any further suggestions or comments of counsel in respect to the discovery program, the same shall be submitted to the Court's chambers on or before noon of September 30, 1988;

2. Orders, pleadings, motions, and other documents in the action entitled *Securities and Exchange Commission v. Drexel Burnham, Lambert Inc., et al.,* 88 Civ. 6209 (MP), shall be filed and docketed separately;

3. The above-entitled actions are not consolidated for pretrial purposes at the present time, but discovery in the above-entitled matters shall be coordinated to avoid and prevent duplication and conflicts on common subjects and common issues of fact;

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re IVAN F. BOESKY SECURITIES LITIGATION	:	MDL Dkt. No. 732 M21-45-MP
ARDEN WAY ASSOCIATES et al., Plaintiffs, v. IVAN F. BOESKY et al., Defendants.	:	87 Civ. 1865 (MP)
MATTHEW C. BUDINKO, Plaintiff, v. IVAN F. BOESKY et al., Defendants.	:	89 Civ. 0845 (MP)
BANKERS LIFE AND CASUALTY COMPANY, Plaintiff, v. IVAN F. BOESKY et al., Defendants.	:	89 Civ. 1882 (MP)

REPLY MEMORANDUM IN SUPPORT OF MOTION OF MICHAEL R. MILKEN AND LOWELL J. MILKEN TO STAY PROCEEDINGS PENDING SUPREME COURT DISPOSITION OF THEIR CERTIORARI PETITION

standing to seek a stay of proceedings before this Court prior to any decision on that motion.

Conclusion

For the foregoing reasons, and those set forth in our opening Memorandum, all proceedings in the above-captioned cases should be stayed pending Supreme Court disposition of Movants' petition for a writ of certiorari.[8]

Dated: April 24, 1989
New York, New York

Respectfully submitted,

By_____
Steven B. Rosenfeld
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Michael R. Milken

By_____
Michael F. Armstrong

LORD DAY & LORD,
BARRETT SMITH
26 Broaday
New York, New York 10004
(212) 422-8180

Attorneys for Lowell J. Milken

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8. Movants respectfully request that, if their motion is denied, this Court certify the question for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE IVAN F. BOESKY SECURITIES LITIGATION	)	MDL Docket No. 732

MOTION TO TRANSFER ACTIONS FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Movant
Michael R. Milken

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

88 Civ. 6209 (MP)

v.

DREXEL BURNHAM LAMBERT INCORPORATED,
et al.,
Defendants.

September 13, 1988
11:30 a.m.

Before:

HON. MILTON POLLACK,

District Judge

APPEARANCES

THOMAS C. NEWKIRK,
ROBERT B. BLACKBURN,
GARY LYNCH,
BARRY GOLDSMITH,
Attorneys for the SEC

CURTIS MALLET-PROVOST COLT & MOSLE
Attorneys for defendants
BY: PETER FLEMING,
of Counsel

CAHILL, GORDON & REINDEL
Attorneys for defendants
BY: THOMAS F. CURNIN,
of Counsel.

(In chambers)

THE COURT: Let me just say as background for this, I will call it a closed meeting in view of some of the things that I have learned about the matter.

I am considerably troubled about the propriety of the way I was approached on this matter. I was called at 4:30 on Saturday afternoon at my home and what the operator said was it was a conference call, but it was a conference call relating to a case pending before me without apparently notice or inclusion of the adversary involved.

Mr. Fleming or Mr. Curnin or both said that they had talked to Arthur Liman, who then referred the matter to Judge Rifkind, who suggested that I be notified in the way I was notified. I haven't checked with Judge Rifkind.

MR. FLEMING: Judge –

THE COURT: Counsel, after starting out to mention something to do with Palais Royal in which my wife has had lifelong interests largely through her first husband's estate was in the process of receiving $50 or $60 million from Drexel Burnham and we had gotten about that far and I said, I don't know what this has got to do with me, but I think you had better have your opposite counsel in my chambers I think I mentioned Monday, and forgot that Monday was the religious holiday that I observe, and then mentioned Tuesday and Mr. Curnin or Mr. Fleming said that he would notify the Commission and ask that the parties be present.

That is a little troublesome for me particularly due to the proliferation of allegations and response and the response and allegations that have been going on in the press the last couple of days that two members of the bar for whom I have the highest regard, I know both of these fellows, Peter Fleming tried a case before me years ago and I dubbed him one of the best trial lawyers that I had heard in my time in the court and before that.

Tom Curnin I have known quite some time and have known him very favorably, but in rethinking what they were trying to tell me and calling me at home in the absence of an adversary, particularly in a case that seems to have some sensitivity, and as I reflect on it what they were telling me was something that might indicate that I was partial or would be partial to Drexel because of some interest that my wife had in Palais Royal. I couldn't figure it out.

Now, they are here to tell you why you should know about my wife and Palais Royal. Let me say at the outset I haven't the slightest economic or any other interest in Palais Royal and I have never have had and my wife's interests are largely those inherited from her first somehow or other and they didn't know about it.

MR. FLEMING: I am talking about appearances. I am not analyzing the situation.

THE COURT: You were attacking me professionally.

MR. FLEMING: No, we were not. You know me from a long while and I have never enjoyed arguing with any court and particularly with your Honor.

We are not attacking you professionally. We felt a professional obligation and Judge Rifkind confirmed that we should advise you of these facts. That is not an attack. That is information.

If I could start, your Honor, because I am flatly concerned about something else. This really has to do with what started this in the beginning and that is the relation of this case to this court by the Commission.

THE COURT: I am not going to let you get into that in this discussion. That is a separate subject entirely.

MR. FLEMING: Can I ask just two questions?

THE COURT: I read the newspapers about that.

MR. FLEMING: I wasn't there.

THE COURT: I don't want to have this matter clouded in any way by anything to do with the first attempt to nudge me out of the case. Forget it, please. I

know why I asked for this meeting and it has to do with whether Pollack –

THE COURT: Did you get a copy of the contract before you called me?

MR. CURNIN: No, Judge, because I didn't think it was necessary.

THE COURT: Are you for real?

MR. CURNIN: Yes, Judge, I am for real. What I thought was important and what Peter thought was important –

THE COURT: You mean you don't know at this point as to who the stockholders contracted with?

MR. CURNIN: I know what information –

THE COURT: Other than what I told you this morning?

MR. CURNIN: Judge, I am going to give you all the information and give the SEC all the information I have.

THE COURT: Look, Tom, don't avoid me. Are you saying you don't know what the contract says and with whom the stockholders contracted?

MR. CURNIN: I believe that I have a general understanding of who the parties are and what the obligation is. I do not know all the detail of it and I conveyed to your Honor and Peter and we jointly conveyed to your Honor whatever information we had and we believed that the information we had was sufficient and important enough that you should be informed of it right away.

THE COURT: I want to tell you something. If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit?

MR. FLEMING: That's not true.

MR. CURNIN: This is the background in which this was going on, consider this: We knew –

THE COURT: Your client is upset because it says something about the Commission and the Commission says something about your client, but you are implicating me. That's where I come in.

MR. FLEMING: Judge, let me ask you a question. Would you have preferred that we not tell you?

THE COURT: I would have preferred that you called them on the telephone and said, look, we think there is something about the partiality or impartiality of the Judge. Let's talk to him. That's what I think Peter Fleming would have done if he were still in the U.S. Attorney's office.

MR. FLEMING: I would never have raised that question with Gary in a telephone call. What I should have done, as your Honor says, I should have called Gary on Saturday instead of Sunday. I will concede that. That was $250 million, part of it is going to be supplied –

THE COURT: What?

MR. CURNIN: There are two companies, Judge. Two companies are going to be put together as the result of an LBO. One of them is Palais Royal and the other is Three Bells Brothers 3.

THE COURT: That is the first I hear any numbers like that.

MR. CURNIN: Palais or its shareholders will receive approximately 100 million and Three Bells Brothers –

THE COURT: That's off, too. They would like to receive that kind of money.

MR. CURNIN: That is the information we have, Judge, and this is the information which we conveyed to you and which I conveyed to Gary and his people yesterday to the extent that I had this information yesterday.

Now –

THE COURT: Has anybody gone out to get the contract itself? Have you fellows got the contract?

MR. LYNCH: We have not had an opportunity to do that, your Honor.

THE COURT: Has anybody inquired into the status of the approaches to all of these companies that are supposed to be looking at this thing?

MR. LYNCH: We attempted to do that this morning,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re IVAN P. BOESKY SECURITIES LITIGATION,

MDL Dkt. No. 732
M21-45-MP

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.

88 Civ. 6209 (MP)

DREXEL BURNHAM, LAMBERT INCORPORATED, et al.,
Defendants.

September 22, 1988
2:00 p.m.

(In open court)

THE COURT: In order to assist us in proceeding, I have drafted up some provisions for counsel to consider and we can address the proceedings through these provisions. It may save a lot of other conversation and I will ask the clerk to pass these out to counsel in the Securities & Exchange Commission case.

Take one and pass the rest. I assume you will take one for each firm. Don't accumulate them among the firms. Make sure they go to lawyers.

These suggestions are not intended to be all inclusive, but I thought that it would be well to address these suggestions at the outset and then hear anything further because if there is anything here that is non-controversial, we can dispose of that and go onto the things that counsel would like to talk about.

Mr. Curnin, do you want to address this for Drexel? I would appreciate it if you would do it from the lectern.

MR. CURNIN: Your Honor, we think that there is a preliminary matter which should be raised before we

discuss orders and discovery in this matter and co-counsel Peter Fleming representing Drexel would like to address that particular issue and then we can get into this other issue if need be.

THE COURT: Thank you.

Mr. Fleming.

MR. FLEMING: Yes, your Honor. There is a motion pending before your Honor returnable October 4. It is our position and Drexel's position and I believe the position of other defendants in the SEC case that your Honor should not rule on any matter in the SEC case until the determination of the motion presently returnable October 4.

THE COURT: Is that in the form of a motion?

MR. FLEMING: My request that you not rule until the determination of that motion is in the form of a motion, a your Honor.

THE COURT: Motion denied.

MR. FLEMING: With that, your Honor, Mr. Curnin will address the consolidation question.

MR. CURNIN: I am somewhat at a disadvantage, your Honor, in that we have just read this outline and, quite frankly, we have not had an opportunity to confer with co-counsel.

THE COURT: Take your time and I will give you that opportunity.

MR. CURNIN: At the outset, we think there are some provisions here which are acceptable to us and to the extent that they are not, I am sure I will hear about it immediately.

THE COURT: Take them down seriatim. No. 1.

MR. CURNIN: As far as I know, your Honor, we would not have an objection to item 1.

THE COURT: Does the commission have any objection to 1?

MR. NEWKIRK: No, your Honor.

THE COURT: Thank you.

MR. CURNIN: As to item 2, your Honor, it is not clear to me what is the intention of the court when you refer here to coordinated discovery? I have some idea I think of what the court has in mind, but it is not all that

CAHILL GORDON & REINDEL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005

FLOYD ABRAMS
ROGER ANDRUS
HENRY G. BISGAIER
SUSAN BUCKLEY
P. KEVIN CASTEL
JAMES J. CLARK
WALTER C. CLIFF, P.C.
BENJAMIN J. COHEN
JOSEPH P. CONWAY
MARSHALL COX
THOMAS F. CURNIN
W. LESLIE DUFFY
VICTOR M. EARLE III
RAYMOND L. FALLS, JR.
PATRICIA FARREN
BARY FRIEDMAN
CIRO A. GAMBONI
CHARLES A. GILMAN
STEPHEN A. GREENE
ROBERT M. HALLMAN
EDWARD A. HANSEN
WILLIAM M. HARTNETT
DAVID R. HYDE
THOMAS R. JONES
ALLEN B. JOSLYN
THOMAS J. KAVALER
LAWRENCE A. KOBRIN
IMMANUEL KOHN
EDWARD P. KRUGMAN
WILLIAM T. LIFLAND
MICHAEL MACRIS

JONATHAN I. MARK
DENIS MCINERNEY, P.C.
RAND MCQUINN *
GERARD M. MEISTRELL
ROGER MELTZER
CLIFFORD L. MICHEL
JOHN P. MITCHELL
MATHIAS E. MONE
HUGH P. MORRISON, JR. *
DONALD J. MULVIHILL
KENNETH W. ORCE
CHARLES PLATTO
ROY L. REARDON
RICHARD L. REINHOLD
DEAN RINGEL
THORN ROSENTHAL
IRWIN SCHNEIDERMAN, P.C.
M. RICHARD SCHUMACHER
JOHN SCHUSTER
LAURENCE A. SILVERMAN
HOWARD G. SLOANE
LAURENCE T. SORKIN
LEONARD A. SPIVAK
GERALD S. TANENBAUM
MICHAEL P. TIERNEY
ROBERT USADI
JOHN R. VAUGHAN
GEORGE WAILAND
RALPH O. WINGER
GARY J. WOLF
JOHN H. YOUNG

WILLIAM E. MCDARTY
SENIOR COUNSEL

SAMUEL ESTREICHER
RICHARD A. MANFORD, D.C. **
JOHN J. STANTON, JR.
DAVID J. YERES
COUNSEL

FREDDY DRESSEN ***
EUROPEAN COUNSEL

WASHINGTON, D.C. OFFICE
1990 K STREET, N.W.
WASHINGTON, D.C. 20006

EUROPEAN OFFICE
10 RUE FRANÇOIS 1ER
75008 PARIS, FRANCE

TELEX/CABLE
RCA 232184 WUT 12706B
CAHILL UR COTTOFRANK NYK
TELECOPIER 212 980-5420

* ADMITTED D.C. ONLY
** ALSO ADMITTED ENGLAND AND JAMAICA
*** ADMITTED FRANCE ONLY

TELEPHONE 212 701-3000
WRITER'S DIRECT NUMBER
(212) 701-3609

September 27, 1988

In re Ivan F. Boesky Securities Litigation
MDL Dkt. No. 732 M21-45-MP

TO LIAISON COUNSEL FOR PLAINTIFFS AND LIAISON COUNSEL FOR DEFENDANTS:

Enclosed are copies of a notice of motion, supporting affidavits and a memorandum of law in the action *Securities and Exchange Commission* v. *Drexel Burnham Lambert Incorporated et al.*, 88 Civ. 6209 MP.

These papers were filed today in the above-captioned action with a separate notice of motion and a request that they be placed under seal. We ask that you maintain the confidentiality of these papers until such time as the Court has ruled.

Very truly yours,

Thomas F. Curnin

cc: Hon. Milton Pollack
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	88 Civ. 6209 (MP)
DREXEL BURNHAM LAMBERT INCORPORATED,	:	[Copy of Memorandum filed
DREXEL BURNHAM LAMBERT GROUP INCORPORATED,	:	under seal. This copy
MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J.	:	contains redactions and
MAULTASCH, PAMELA R. MONZERT, VICTOR POSNER,	:	pseudonyms; see footnote 1.]
STEVEN N. POSNER and PENNSYLVANIA	:	
ENGINEERING CORPORATION,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION SEEKING RECUSAL OF THE HON. MILTON POLLACK AND RANDOM REASSIGNMENT OF THIS CASE

Defendants Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group Incorporated ("Drexel"), Michael R. Milken, Lowell J. Milken, Cary J. Maultasch and Pamela R. Monzert, respectfully submit this memorandum of law, together with the annexed affidavits of Frederick McCarthy and Frederick S. Moseley, IV, and counsel, both sworn to September 20, 1988, and supporting exhibits, in support of their motion seeking recusal of the Honorable Milton Pollack, pursuant to 28 U.S.C. § 455.

Recusal is required as (a family member) is likely to receive some $** as a part of a leveraged buy-out for which Drexel will raise approximately $** in mezzanine financing.[1] The inescapable conclusion is that this Court's "impartiality might reasonably be questioned" in these circumstances (§ 455(a)).

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1. The material in parentheses indicates pseudonyms utilized in place of names set forth in papers filed under seal. Double asterisks indicate redacted material.

There is clearly no choice or question that this motion is required and must be filed. It is imperative under any ethical standards that the facts underlying this motion be disclosed. Otherwise, a reasonable person would suspect a loss of judicial impartiality and would question whether parties were deliberately hiding facts in the hopes of currying favor with a trial judge who must administer and indeed decide a large part of this case without a jury.

Preliminary Statement

The SEC filed this civil enforcement action against Drexel and others on September 7. Because the SEC designated this case as "related" to certain private cases pending before the Honorable Milton Pollack, the Clerk immediately assigned the case to Judge Pollack.

We respectfully submit that the established standards for judicial disqualification require Judge Pollack to recuse himself immediately from further participation in this action. As the McCarthy/Moseley affidavit explains (the family member), owns or controls through family trusts over ** of the stock of (Company A), a family-owned corporation that owns and operates ** in **.[2] (The family member) and ** family trusts stand to receive about $** in cash by virtue of a pending leveraged buy-out transaction. The transaction is to be financed, in significant part, by Drexel through its High Yield Bond Department, of which the individual Drexel defendants are all members. As the proposed transaction has been structured, Drexel will also be one of the buyers of the equity in the enterprise being sold by (the family member). Under these circumstances, the appearance of conflict is inescapable.

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2. **

Facts

The relevant facts, set forth more fully in the annexed joint affidavit of Messrs. McCarthy and Moseley, are as follows:

In or about **, (Company A) became and continues to be the subject of a pending leveraged buy-out transaction ("the

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	:	
v.	:	
DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, PAMELA R. MONZERT, VICTOR POSNER, STEVEN N. POSNER, and PENNSYLVANIA ENGINEERING CORPORATION,	:	88 Civ. 6209 (MP)
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ARTHUR L. LIMAN, being duly sworn deposes and says:

1. At the time we filed the recusal motion on September 20, 1988, I was unaware that our firm had undertaken any services for George and Phyllis Asch, or for Palais Royal. I was first advised by my partner, Alfred Youngwood, that he had done some tax, family and estate work for the Aschs on or about September 26. Mr. Youngwood told Mr. Flumenbaum on the evening of September 23, saying that he was mentioning the representation because of its possible impact on the question of Judge Pollack's recusal.

?????? course of the representation of the Aschs until we received a copy of Judge Pollack's order to show cause. The only disclosure of client confidences was by the Court in the order to show cause, not by us. The recusal motion was based on indisputable facts provided by Drexel, namely, that Drexel is arranging the mezzanine financing for a leveraged buyout that will result in

the payment to Mrs. Pollack of approximately $30 million for her interest in Palais Royal.

4. We know of no fiduciary duty between our firm and Palais Royal or its shareholders which is in any conceivable way involved in the Court's order to show cause. Neither Palais Royal nor its shareholders have an interest in who presides in the SEC case. Moreover, I know of no fiduciary duty to any client that would require a lawyer to refrain from making a recusal motion where warranted. Indeed, if a lawyer has a representation that requires disqualification of a Judge, he has not only a right but a transcendent duty to advise the Court and to request recusal. We have done that. If, for reasons that are not discernible to us, Palais Royal or its shareholders can be adversely affected by the recusal motion, as Judge Pollack's sua sponte order to show cause suggests, then that is all the more reason why he must recuse himself.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT, Petitioners.	)	No. 88-3060

REPLY OF SECURITIES AND EXCHANGE COMMISSION TO OPPOSITION TO JOINT MOTION TO MODIFY THIS COURT'S STAY

The Commission submits this Reply to respond to certain statements in the Opposition filed by defendants Michael R. Milken, Lowell J. Milken and Pamela R. Monzert ("Milken defendants"). As demonstrated in their Opposition, the Milken defendants do not object to the joint motion of the Commission and the settling defendants that this Court modify its stay of district court proceedings to permit consent judgments to be entered and administered. Their objection is to Judge Pollack.

There are compelling reasons that the settlement should be presented to Judge Pollack. As this Court noted in its decision denying mandamus, Judge Pollack has presided over substantial pretrial activity in certain civil securities fraud actions naming Drexel as a defendant, consolidated in 1987 as *In re Ivan F. Boesky Securities Litigation*. The settlement with Drexel provides for a $350 million civil disgorgement fund to compensate persons with valid claims against Drexel arising out of certain defined activities under the securities laws. Since many of the claimants to the $350 million fund under the settlement are likely to include plaintiffs in the private civil actions, Judge Pollack is the

most appropriate Judge to administer the consent decrees. Defendants' attempt to obtain another judge to enter and administer the settlement would circumvent this Court's decision that Judge Pollack was not required to recuse himself.

For the reasons stated, the Commission urges this Court to modify the stay to permit entry and administration of the consent decrees against these settling defendants — a result to which all parties agree — and to remand to Judge Pollack for this purpose.

Respectfully submitted,

Paul Gonson
Jacob H. Stillman
Rosalind C. Cohen
Leslie E. Smith

SECURITIES AND EXCHANGE COMMISSION
450 5th Street, N.W.
Washington, D.C. 20549
(202) 272-2493 (Cohen)

Dated: April 17, 1989

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

1285 AVENUE OF THE AMERICAS NEW YORK, NEW YORK 10019-6064

(212) 373-3191 May 1, 1989

Patricia D. Gugin, Esq.
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103-6365

Milken, et al. v. SEC

Dear Ms. Gugin:

I am in receipt of your letter dated April 27, 1989 to Mr. Arthur Liman.

Please be advised that we do not consent to plaintiffs in the *Boesky Securities Litigation* filing an *amicus curiae* brief in the Supreme Court in the above captioned matter.

Sincerely,

Martin Flumenbaum

Via Telecopy